EDITORIAL NOTES.

By Cyrus E. Woods.

The Need for Revision of Pennsylvania Legislative Bills.

On the third day of November in the year of our Lord one thousand eight hundred and seventy-three, there was adopted at Philadelphia the Constitution of the Commonwealth of Pennsylvania. With a view of restricting the legislative power, which without constitutional restriction would be absolute, it contained certain provisions whereby the exercise of that power was limited, and to which it was confined. Among these provisions special or local legislation, as such, was practically prohibited by the wide and general range of subjects from which it was debarred, and the form of bills, and the manner in which they should be presented and considered, was provided for. The only constitutional provision for this consideration of bills, however, was to prohibit their passage without reference to some committee of the legislature itself, no provision being made for the assistance of that committee by specialists trained in the formation of laws, or by persons qualified to pass upon the subjects to which the bills under consideration related. No means were provided by the constitution itself, or have been provided by subsequent legislation, whereby the legislature in its consideration of bills might receive information by which it could arrive at a just and intelligent estimate of their character, and of the legal significance of the form and language in which they were expressed. As a result bills have been passed without regard to, or even the knowledge of, existing laws, or of conflicting bills which were even then pending in the legislative body. Bills expressed in language so complicated and confusing as to necessitate an explanation and interpretation from the Supreme Court, before they could be safely acted upon have become laws, and the courts have

been burdened by passing upon the constitutionality of laws, the constitutionality of which should never have come before them at all, if the legislature had been in possession of information regarding them upon which they could have acted intelligently.

Some ten years ago the American Bar Association ended their deliberations upon this subject, by passing the following resolution:

"*Resolved*, That in view of the growing evil of hasty and ill-considered legislation, and of defective phraseology in the statute law, this Association recommends the adoption by the several States, of a permanent system by which the important duty of revising and maturing the acts introduced into the legislatures shall be entrusted to competent officers, either by the creation of special commissions or committees of revision, or by devolving the duty upon the Attorney General of the State."

Some of the States have already taken steps in the direction thus suggested. Pennsylvania has not, and the necessity for her action in the matter can well be shown by a reference to two of the bills passed by her last legislature.

The Corporation Act of 29th April, 1874, provided a general scheme for the formation of corporations. The second section contained a list of the purposes for which corporations might be organized. By a later act of 17th April, 1876, this entire section was amended and re-enacted, increasing the number of purposes for which corporations might be formed. By various later acts passed from time to time the right of incorporation has been extended to include corporations organized for various other purposes not included in the act of 29th April, 1874, as amended by the act of 17th April, 1876. Most if not all of these amendments have been put in the form of a re-enactment, not of the entire § 2, which contained all of the purposes for which corporations could be organized, but in the form of a re-enactment of the particular sub-section of § 2,

in which the new class of corporations would properly belong.

By the act of 10th June, 1893, an amendment of the act of April 17th, 1876, was made, by which drainage companies were added to the list of corporations authorized. The draughtsman of the act undertook to make this amendment by a re-enactment of the entire § 2 of the act of 17th April, 1876. In doing so, he forgot to include the amendments subsequent to that act, and re-enacted the section with the single addition of drainage companies, with the result that he has either repealed all the amendments subsequent to the act of 17th April, 1876, or at least raised grave doubts as to whether they are still in operation.

These amendments are of great importance. They are:

First.—Act of 8th May, 1889, P. L. 136, providing for the incorporation and regulation of electric light, heat and power companies.

Second.—Act of 16th May, 1889, P. L. 241, authorizing the incorporation of companies for the purpose of the purchasing of copyrights for books, publications and registered trade-marks with the right to issue license for the same and receive pay therefor.

Third.—Act of 16th May, 1889, P. L., 226, authorizing the incorporation of companies for the purpose of the supply, storage or transportation of water and water power for commercial and manufacturing purposes.

Fourth.—Act of 3d June, 1893, P. L. 287, authorizing the incorporation of companies for the manufacture and production of silver-ware, plated-ware, jewelry, works of ornament and art, and pictures, and the buying and selling of such articles.

The act of June 10, 1893, is so carelessly drawn that the Governor, in affixing his signature to it, says: "I have given my approval to this bill, notwithstanding certain clumsiness and carelessness on the part of the transcribing clerks, by which, in the copy presented for my signature, certain paragraphs in the re-enacting clauses have been unnecessarily repeated. In the copy as prepared for my approval, the first seven classes of corporations not for profit,

and the twenty-fourth, have been written into the bill in addition to such re-enactments as were required. The real purpose of the bill, viz.: To provide for the incorporation of sewer and drainage companies, is one which meets my approval, and I, therefore, have affixed my signature to the bill, notwithstanding the defects to which I call attention, and which can do no greater harm than to disfigure the statute books. None the less, the existence of them reflects on the competency of the transcribing clerks, if not on the strict attention to duty reasonably expected of the committees to compare bills. The condition of this and some other bills submitted to me, with like defects, affords additional ground for condemnation of the usual procedure of passing bills with undue haste and recklessness during the closing days of the session."

Of course, the Supreme Court may hold the act of 10th June, 1893, to be unconstitutional, or that it is simply to be read in place of the act of 17th April, 1876, and to have no effect on the other supplements of the act of 1874, but an examination of the act itself will convince any lawyer of the difficulties in his path to logically maintain such position. Even if he does accomplish the desired result, it will take months, and possibly years of litigation and confusion and uncertainty, before the question is finally determined.

The legislature seems to have created equal confusion and uncertainty in the Marriage License Act of 23d June, 1885. Section 1 of that act provides that from and after October 1, 1885, no person within this commonwealth shall be joined in marriage until a license shall have been obtained for that purpose, and the remaining sections only prescribe the method of obtaining the license thus required, and the manner of registering it. The Act of 1st May, 1893, which became immediately operative, amends Section 1 of the act of 1885, and substitutes therefor a new section, to the effect that on and after October 1, 1895, no person within this commonwealth shall be joined in marriage until a license shall have been obtained, etc. The act of 1885, as it now stands, would, therefore, seem to indicate

that a marriage license should not be required in Pennsylvania from May 1, 1893, until October 1, 1895, or at least to create a very grave doubt as to its requirement.

In view of the legislation enacted by the last session of our legislature, examples of which have been herein given, to say nothing of that enacted at sessions prior thereto, the necessity for Pennsylvania to adopt a system by which the important duty of revising and maturing the acts introduced into the legislature must be evident.

Philadelphia.

CIVIL LIBERTY AND A WRITTEN CONSTITUTION.[1]

III.

The Reasonableness of that Canon of Constitutional Interpretation which would Prohibit a Legislature from Passing Any Law Contrary to the Fundamental Principles of Natural Justice, Unless the Law is Shown to be Expressly Authorized by the Constitution.

WE have shown in the EDITORIAL NOTES for October that this canon was one which was adopted by CHASE and STORY, by KENT, WEBSTER and MARSHALL, and practically all the earlier lights of our constitutional law. Yet there remain two things more:

First, *The reasonableness of supposing that the people when they adopt a written constitution, and establish a government, and give to the legislature all legislative power, did not intend to give them any power to transgress "fundamental principles of natural justice."*

Second, *The wisdom or reasonableness of giving into the hands of a body of men called judges the right to decide the question whether any particular law transgresses the "principles of natural justice."*

On both these heads we know no better exposition of the negative side of the argument than that contained in

[1] Commenced in the August number, p. 782; continued in the October issue, p. 971. To be concluded by RICHARD C. MCMURTRIE, LL.D., in the December number.

the two articles of Mr. McMURTRIE.[1] His argument on the first point, namely, that those who adopted our constitution intended to confer on their legislature all powers not expressly taken away, can best be put in his own words. He says:[2] "That men, at the time of the adoption of the Federal Constitution, believed in the power of State legislatures, unless restrained by the constitutions they were framing, Federal or State, to do much mischief, injustice and iniquity, cannot be disputed. Else why do we find them putting a muzzle on the power to murder by act of Assembly; to rob by statute; to convert innocence into crime, and punish it as such by the same law? The power of the legislature to do these things was believed in when our constitution prohibited attainders and *ex post facto* laws, and compelled compensation for the taking of private property for public purposes."

The argument is strong. Is it conclusive? Bills of Rights are now inserted in State constitutions largely out of habit. Habit also has prescribed exactly what shall go into a Bill of Rights. For this reason we know of no State constitution which expressly prohibits in so many words the taking of private property for a private purpose with or without compensation, though every citizen on a moment's reflection would admit that this was more important than that private property should not be taken for a public purpose except after compensation.

If these bills of rights are at present inserted from habit, does the existence of bills of rights in the earliest constitutions prove anything concerning what the legislature otherwise had power to do? When first inserted, a bill of rights was a natural result of ideas concerning the dignity of man and human liberty, which then filled all the pamphlets of the time—and the world was full of pamphlets—on man, and government, and society. When first adopted, they were rather declarations of the nature of

[1] The first in the January number of the present year, 32 AMERICAN LAW REGISTER AND REVIEW, 1. The second in the June number, 32 AMERICAN LAW REGISTER AND REVIEW, 594.

[2] *Supra*, p. 3.

government and the rights of man than impassable barriers to legislative power. They were great truths, binding on the conscience of the legislature, but which, like other bands of a similar nature, were not of iron, and easily broken by an act of the legislature. An act which really trampled on principles of justice was, nevertheless, a law to be respected by the courts, however, much the individual might feel free in breaking it, and by force asserting his "inalienable rights." Inalienable rights meant rights from which no man could part, and to protect which he was justified in resisting any authority, no matter how ancient or respectable. When people took oaths to support the constitution, the Bill of Rights was evidence to them that they did not break their oaths when they refused to obey laws which affected what they considered their inalienable rights. Every patriot in the last days of the revolution probably considered that he was his own judge as to what were these inalienable rights. The Bill of Rights in his State constitution was to him a gospel which he himself must interpret.

To whom the idea first occurred that the courts were places where the constitutionality of an act could be discussed will probably never be finally decided. It was hailed with joy by all who desired to build up a reign of law, and therefore more especially by the Federalist judges. For it was evident that JEFFERSON'S wish for a revolution every ten years to water the tree of liberty would come true if each man was his own judge as to what law he would or would not obey. And it was probably JEFFERSON'S ignorance of the then new and still disputed doctrine that a court could set aside a law for unconstitutionality that led him to that rash quasi-approval of Shay's rebellion. There is some force in the argument that, if the legislature cannot be kept to the fundamental principles of individual liberty by the judiciary how else, except by revolution, is that liberty to be preserved?

If the ideas concerning the power of a court to set aside a law for unconstitutionality had become prevalent before the adoption of Bills of Rights, then there might be

some force in the argument that unless the people thought the legislature could "kill by act of Assembly" they would not have put in the prohibition against bills of attainder. But when we realize that these Bills of Rights were originally nothing but a declaration of the proper principles which govern legislation, then surely no such conclusion could be drawn from their insertion.

But when once the courts had brought themselves to the position of declaring an act of the legislature void, then they at once put themselves in the place of the individual citizen as an interpreter and defender of his "inalienable rights." What these rights were are partly expressly stated in the different "Bills of Rights." But there was no reason why "Bills of Rights" should contain the alpha and omega of civil liberty. Not originally adopted as express restraints on the legislature because none were thought possible, but rather as declarations of the spirit which should actuate legislation, there were many rights, as KENT said, "dear alike to freedom and to justice," which were not expressly mentioned. As far as people thought they could check their legislature they had done so. The ideas of the time absolved all men from allegience to the laws of a legislature which transgressed fundamental principles of justice. Once the court undertook to hold the legislature to their constitutional powers, they assumed the responsibility of defending any interference with individual rights. It is out of the question to suppose that men just successful in throwing off a foreign power, full of the ideas which were then agitating French social life to the core, would have voluntarily given to the legislature power to trample on every civil right. True, they did not see how the legislature could be restrained, and they had to content themselves with a general declaration of the nature of government. But when once the court had solved this last problem, it was necessary to say that any law which trangressed the principles of justice, *i. e.*, which would have, according to the theoretic ideas of the times, warranted a revolution to resist, was unconstitutional, because the legislature had

never been granted that power. That the power to trample upon individual rights had never been granted everybody admitted, the innovation was the power of the court and not of the legislature to decide what was an act contrary to "the fundamental principles of natural justice."

This last brings us to the second question. If the terms, "the fundamental principles of natural justice" are simply "high-sounding phrases," incapable of exact definition, and conveying no complete concept; if, in other words, they simply mean very inexpedient or very unwise, then, as Mr. McMURTRIE says, because a man happens to write the word "judge" after his name instead of "senator," this does not make the act of passing on such a question any the less an act of legislation, instead of a judicial decision. "If the folly or injustice or the wisdom of the law is a ground for refusing obedience, it is clear the judiciary are by the constitution made part of the legislature, and perform a function in its very nature legislative."[1]

There is much force in this position, and yet would it not apply equally to all judicial consideration of the constitutionality of legislative acts? Our Federal courts decide what is and what is not a law dealing with interstate commerce. The meaning of the words in the constitution "commerce between the States" has received the most minute examination, and, as a result, the expanded definition would cover many pages. It is true that things which Congress or a State legislature cannot do are not expressly set forth in the constitution. It is contended that they are found in those great charters of human liberty, such as Magna Charta and the Declaration of Independence. So, also, the power of Congress to establish a bank is not set forth in so many words, and yet Chief Justice MARSHALL upheld the national bank on the ground that it was necessary and proper to carry out the powers of the national government. Whether it is more difficult to decide what is a "necessary and proper power" than what are the fundamental principles of individual

[1] *Supra*, p. 595.

liberty we leave others to discuss. Mr. McMURTRIE himself, in his able plea for the "legal tender notes,"[1] gives proof that the terms "necessary and proper" are not incapable of exact definition, yet that does not cause him to declare that the court has no power to lay down broad principles on the subject.

The best proof, however, that it is possible for one to lay down with tolerable exactness the powers which it will not be presumed that a legislature has been granted, except it be expressly so stated in the constitution, is found in the opinion of Mr. Justice CHASE, in the case of Calder *v.* Bull.[2] As previously quoted, Mr. Justice CHASE says: "A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law, a law that destroys or impairs the lawful private contracts of citizens, a law that makes a man a judge in his own case, or a law that takes private property from A and gives it to B (is unconstitutional). It is against reason and justice for a people to entrust a legislature with such powers, and therefore they will not be presumed to have done it."

All his views as to unconstitutional laws here expressed may not be the ones ultimately adopted, but the opinion is a proof that the "high-sounding phrases of the Declaration of Independence" had as exact and definite a meaning to his mind as the words "interstate commerce" have to ours, and that in applying these principles to an act to see if it was contrary to what he called "natural justice," he would be applying, not his own opinions as to what was unwise, but fixed principles of law.

We must acknowledge, however, that if anything could convince us of the impossibility of developing a constitutional law which will relate to the civil liberty of the individual, it would be some of the expressions of those whom we follow in thinking that the legislature has not all power except where expressly denied. Thus, in Godcharles

[1] Plea for Supreme Court, observations on Mr. Geo. Bancroft's plea for the constitution, 1881.

[2] 3 Dall., 386 (1798).

and Company *v.* Wigeman,[1] the Supreme Court of the State of Pennsylvania decided that the legislature could not prescribe that wages should be paid in money and not in store orders, because it interfered with the free right of contract. We echo Mr. McMURTRIE in the criticism on this case and say: "The spectacle of a government that cannot prohibit a contract merely because two grown persons desire to make it, is so utterly absurd as to be quite beyond the region of discussion if government of any kind is to continue." In Budd *v.* New York,[2] the power of a government to regulate prices was impliedly denied by the majority, and fiercely denied by the minority, principally because the paternal theory of government was odious to the judges.[3]

All this seems to be an attempt to make theories of government, held by only a part of our people, part of our constitutional law. Constitutional law, in so far as it pertains to the civil rights and immunities of the individual, was wisely left by our forefathers to those principles which all parties professed to believe, and only transgressed in moments of political excitement. Had they attempted to fasten the particular ideas of a single party concerning the proper scope of governmental activity, judges would long ago have found it impossible to uphold the constitution. It is not that Mr. Justice BREWER, or other able men, cannot promulgate any exact principles of what the legislature, unless expressly permitted by the constitution, can or cannot do—principles that could be applied by the courts just as any other legal principles are applied—but that they tend to add other restraints on the legislature than those which it is either reasonable to expect that those who adopted the constitution wished to place or in which it is wise that any legislature at the present time should be restrained.

In other words, we must take issue with Mr. McMUR-

[1] 113 Pa. St., 431 (1886).

[2] 145 U. S., 517 (1892).

[3] See on the regulation of prices an article entitled, "Can Prices be Regulated by Law?" *Supra*, p. 19, January number.

TRIE, and those who regard a constitution as an instrument which takes away power from an omnipotent legislature. There are, we believe, many things a State legislature cannot do, except they are expressly permitted, which, we may add, they never are. On the other hand, we do not wish to be understood as differing with Mr. MCMURTRIE and others, who, holding an opposite opinion on this first point, criticise some of the recent applications of this canon of constitutional interpretation. We believe, for instance, that in such cases as the regulation of prices, the legislature has the power, unless expressly prohibited.

The thought which we have tried to bring out in these papers, is that the canon of constitutional interpretation, which would confer on a legislature all power not expressly taken away from a legislature, is just as much a mistake as to say that all power not expressly granted is withheld. Rather from the extraordinary nature of some powers, it seems to us we are forced to regard them as withheld if they are not expressly granted; while other powers, whose exercise, however unwise, do not shock us as against all justice, or of which, to use a term of Chief Justice MARSHALL'S, it can be said they are not "legislative powers at all," should rightly be considered as granted, if they are not expressly withheld. It may not be easy to draw the line, but we do not doubt that the cases which will arise in the next few years will prove that it is no more difficult than many applications of other principles which courts must make in the slow development of the law.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the following month. Books should be sent to Wm. Draper Lewis, Esq., 701 Drexel Building, Phila., Pa.]

LECTURES ON SANITARY LAW. By A. WYNTER BLYTH. London and New York: MacMillan & Co., 1893.

SELECT CASES ON EVIDENCE AT THE COMMON LAW. By JAMES BRADLEY THAYER, LL.D. Cambridge: Charles W. Sever, 1892.